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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

HENRY SHAIN PROFESSIONAL CORPORATION, **Plaintiff, Cross-Defendant and Respondent,** **v.** **CHARLES BERGERON,** **Defendant, Cross-Complainant and Appellant;** **BRADSHAW & ASSOCIATES, A PROFESSIONAL CORPORATION, et al.,** **Cross-Defendants and Appellants.**	**A131328** **(San Francisco City & County Super. Ct. No. CGC-08-472133)**

Cross-defendants the law offices of Bradshaw & Associates, a Professional Corporation, and Attorney Drexel A. Bradshaw (collectively, Bradshaw) appeal a judgment following a court trial requiring Bradshaw to disgorge $118,241.10 of the $160,000 contingency fee it collected from its client, defendant and cross-complainant Charles Bergeron, in an underlying trust matter. Bradshaw contends the court improperly interpreted Business and Professions Code section 6147, subdivision (a)(2) (hereafter, section 6147(a)(2)).[1] We agree and reverse that part of the judgment ordering Bradshaw to disgorge $118,241.10 from its fee and ordering payment of that amount to Bergeron.

Bergeron cross-appeals from that part of the judgment ordering that $25,000 of the funds received from his settlement in the underlying trust action and held in trust be released to his former attorney, plaintiff and cross-defendant Henry Shain Professional Corporation (Shain). Bergeron contends the $25,000 should have been released to him instead of to Shain. We reject the contention and affirm that portion of the judgment making the sum of $25,000 payable to Shain.

BACKGROUND

On August 21, 2005, Shain began working on behalf of Bergeron. On September 12, they entered into a written contingency fee contract for Shain's representation of Bergeron in Bergeron's contest of the Joseph G. McLaughlin Living Trust. Pursuant to the contingency fee contract, Bergeron agreed to assign Shain a lien and to pay him 40 percent if the trust matter settled before an arbitration or mandatory settlement conference, and 50 percent thereafter. On June 28, 2006, Bergeron orally discharged Shain. On August 10, the court granted Shain's motion to be relieved as Bergeron's counsel.

On August 11, 2006, Shain executed and served on Bergeron and Attorney Richard Harris, of the law firm of Erskine & Tulley, a "Notice of Attorney's Lien" for a maximum sum of $25,000 against any proceeds obtained by Bergeron in *In re Estate of Joseph G. McLaughlin Living Trust, Dated June 27, 2005* (Super. Ct. S.F. City and

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[1] All undesignated section references are to the Business and Professions Code.

County, No. CPF-05-505721) (the Trust action).[2] Shain's notice of attorney's lien was filed on August 15, 2006. Shain's billing records established total billing of $23,280 for legal services it rendered on behalf of Bergeron in the Trust action.[3]

On January 24, 2007, Bergeron retained Bradshaw to represent him in the Trust action. Their written contingency fee agreement (the Bradshaw fee agreement) provided in relevant part: "You[, Bergeron,] agree that the following contingency fee provision is fair and reasonable, and agree to pay [Bradshaw's] fees as follows: an amount equal to forty (40%) of any recovery obtained." The Bradshaw fee agreement also provided: "You specifically authorize [Bradshaw] to incur reasonable costs and expenses in performing legal services under this Agreement. You agree to pay for such costs and expenses in addition to [Bradshaw's] fees discussed above. Costs and expenses reasonably necessary in this matter may include, but are not limited to, the following: [¶] 1. Computerized legal research [¶] 2. Court filing fees [¶] 3. Process service fees [¶] 4. Private investigation fees [¶] 5. Jury fees [¶] 6. Expert consultation and appearance at depositions or trial [¶] 7. Court reporter fees [¶] 8. Photographic or graphic design fees [¶] 9. Mail, messenger, and other delivery fees [¶] 10. Fax and copies at $0.20 per page." The Bradshaw fee agreement was silent as to the existence and payment of Shain's attorney fee lien or that Bergeron was to bear the cost of that lien or Shain's attorney fees from Bergeron's portion of any resulting recovery.

Also on January 24, 2007, Bergeron signed a letter authorizing Shain to disclose any information regarding the Trust action to Bradshaw. Bradshaw faxed a copy of Bergeron's letter to Shain. The fax is date and time stamped January 24, 2007 at 2:51:41 p.m. Bradshaw's billing records reveal that on January 25, Drexel Bradshaw called Shain.

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[2] Harris represented the trustee in the Trust action.

[3] The court found that $23,280 was reasonable and that Shain should be paid that amount plus $1,720 in interest. Those findings are not at issue in the appeal and cross-appeal.

At a November 20, 2007 mediation of the Trust action, a tentative settlement was reached providing for payment by the trustee to Bergeron and Bradshaw. The tentative agreement provided that the settlement was conditioned on the release of Shain's attorney fee lien.

On November 28, 2007, Shain executed a written release of his attorney fee lien on condition that $25,000 be held in trust for it by Erskine & Tulley until resolution of the fee dispute between Shain and Bergeron. The agreement for release of the lien was negotiated between Shain, Harris, and Michael Bracamontes, a Bradshaw associate, on behalf of Bergeron.

The final settlement agreement in the Trust action was executed on November 30, 2007, by Bergeron, Bracamontes as counsel for Bergeron, the trustee, and Harris as counsel for the trustee. It provided, in part, that the settlement was conditioned on the release of Shain's attorney fee lien and, thereafter, immediate payment to Bergeron of $277,000.[4]

At some point after the Trust action settled, Bradshaw received approximately $160,000 as its 40 percent contingency fee.

In a December 4, 2007 letter to Bergeron, Drexel Bradshaw stated that Bergeron's position that Bergeron "agreed to pay [Shain] nothing," despite Shain's significant work on Bergeron's case "appears to be somewhat unreasonable." Bradshaw urged Bergeron to offer to pay Shain the reasonable value of Shain's services pursuant to Bergeron's fee agreement with Shain.

In a December 27, 2007 e-mail to Bergeron, Shain stated that since their contingency fee contract did not provide for arbitration, the matter of Shain's claim to the $25,000 lien amount held in trust would have to be settled through the courts or arbitrated through the San Francisco Bar Association. The e-mail stated that when Bergeron entered into the settlement of the Trust action, he understood that $25,000 was going to

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[4] The final settlement agreement also provided other specified funds would subsequently be disbursed to Bergeron.

be set aside as a maximum amount to pay Shain's claim. Shain offered to settle the fee claim with Bergeron by reducing its lien by $2,500. Bergeron did not respond to Shain's e-mail.

On May 1, 2008, Shain filed an amended complaint for breach of contract against Bergeron to recover the $25,000 owed as attorney fees pursuant to the lien.[5] Bergeron filed an amended cross-complaint seeking declaratory relief against Bradshaw and Shain; it alleged indemnification, breach of fiduciary duty, violation of section 6147(a)(2), negligence, and breach of contract solely against Bradshaw.[6]

Trial Testimony

Drexel Bradshaw

Drexel Bradshaw testified that on January 24, 2007, Bergeron met first with him and signed the Bradshaw fee agreement and then met with Bracamontes to go over more details in the case. Drexel Bradshaw was unaware of Shain's prior representation of Bergeron and Shain's attorney fee lien until after the Bradshaw fee agreement was signed. He said that had he been aware of the lien at the time he entered into the Bradshaw fee agreement, he might have handled it differently. Drexel Bradshaw also testified that at the time he and Bergeron executed the Bradshaw fee agreement, Bergeron told him he had already filed a lawsuit, in propria persona, in the Trust action. Bergeron did not inform Drexel Bradshaw that he had been represented by counsel in the trust matter until after the Bradshaw fee agreement was executed, and Drexel Bradshaw assumed Bergeron had been representing himself. Drexel Bradshaw said that later that day or the next day he learned that Shain had previously represented Bergeron in the Trust action.

Drexel Bradshaw said the content of the Bradshaw fee agreement was modeled after the fee agreements on the "California State Bar Web site." He also testified that, at

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5 Shain's original complaint, filed against Bergeron on February 13, 2008, is not included in the appellate record.

6 Bergeron's original cross-complaint filed on June 11, 2008, is not included in the appellate record.

Bradshaw, liens from prior attorneys are "always handled separate and apart from [Bradshaw's] fee because [Bradshaw's] fee agreement is crystal clear that the 40 percent is [its] fee and the other attorney's fee or any other liens or other obligations the client may have are obligations of the client and not obligations of [Bradshaw]."

Drexel Bradshaw testified that at the conclusion of the mediation, $25,000 was set aside from Bergeron's share of the settlement proceeds. He also said that after the mediation, he told Bergeron he would try to reduce the amount of Shain's lien to be paid from the funds held in trust. Bergeron's position was that he did not want to pay Shain anything. Drexel Bradshaw wrote the December 4, 2007 letter to Bergeron after Shain was unwilling to accept less than the lien amount as fees. When Bergeron remained adamant that he did not want to pay Shain anything, Drexel Bradshaw told Bergeron he would stop trying to negotiate a lesser lien amount and Bergeron was "on [his] own."

Michael Bracamontes

Bracamontes testified that he was not present when the Bradshaw fee agreement was executed in Drexel Bradshaw's office. He said it was "quite likely" he met with Bergeron immediately after Bergeron met with Drexel Bradshaw. On cross-examination, Bracamontes confirmed that he met with Bergeron on January 24, 2007, after the Bradshaw fee agreement was executed. Bracamontes said that Bradshaw's billing records show that Bracamontes reviewed the Register of Actions in the Trust action on January 24, 2007, and at that time, he would have become aware of Shain's attorney fee lien.

Bracamontes also testified that Shain's attorney fee lien was discussed during the settlement negotiations in the Trust action and disposition of the lien was a condition of settling that action. Bracamontes confirmed that during the mediation he, Harris, and Shain agreed that $25,000 would be set aside from the settlement funds and Bergeron and Shain "would deal with [the disputed amount of Shain's fee] on their own." Bracamontes testified that Bergeron understood that the $25,000 would be "taken directly from the settlement and put into a trust account . . . to satisfy any future judgments or settlements."

On cross-examination Bracamontes clarified that during the mediation, he and Bergeron talked about Shain's lien and it was agreed that $25,000 from the settlement fund would be set aside so that Bergeron and Shain could resolve their dispute as to the amount of fees Bergeron owed to Shain. Bracamontes testified that Bradshaw's fee was to be 40 percent of Bergeron's gross recovery from the settlement. Thus, Bradshaw would get 40 percent of Bergeron's $400,000 settlement and Shain's ultimate fee would come from Bergeron's portion of the settlement. Bracamontes said he never represented to Bergeron that Bradshaw would handle Bergeron's attorney fee dispute with Shain.

Henry Shain

Henry Shain testified that during the mediation he made it clear to Bracamontes and Harris that Shain would not release its attorney fee lien "unless there was a fund there." Thereafter, Bracamontes, Harris, and Shain agreed that $25,000 would be set aside in a trust account to be used to satisfy any judgment, arbitration or settlement Shain obtained for the reasonable value of its services. Bracamontes prepared a release of the lien. On November 28, 2007, Bracamontes sent Shain the written release of the lien, again advising Shain that the $25,000 would be set aside in a trust account. Thereafter, Bradshaw informed Shain that it would not represent Bergeron in any arbitration of Shain's fee. Henry Shain said he never would have released Shain's attorney fee lien had he not been promised the money would be set aside from the settlement amount. Henry Shain said "[t]here was never any discussion that Bradshaw would pay it. It was always from the settlement, which was [Bergeron's] settlement." He said he had nothing to do with the fee arrangement between Bergeron and Bradshaw. He wanted "security," and insisted upon the attorney fee lien so that when it came time to prove Shain's fee for representing Bergeron, a fund of money would be available for payment of the fee. Henry Shain said Bergeron's settlement was privileged and, therefore, he did not know how much Bergeron was getting. He also said Bracamontes, Harris, and Bergeron never represented that the $25,000 set aside for Shain's attorney fee lien would be deducted from the 40 percent fees earmarked for Bradshaw.

Charles Bergeron

Bergeron testified that on January 24, 2007, when he executed the Bradshaw fee agreement, Drexel Bradshaw reminded him, "Hey, you have this lien here." Bergeron's understanding at that point was that Bradshaw would pay Shain's attorney fee lien or take care of it in some way. On cross-examination, Bergeron gave conflicting testimony as to whether he informed Drexel Bradshaw on January 24 of the existence of Shain's attorney fee lien. Bergeron also testified that on January 24, when he read and signed the Bradshaw fee agreement his "state of mind was gone."

Bergeron testified he understood that, in order to settle the Trust action and obtain the settlement funds, Shain's lien had to be dealt with. He acknowledged that he entered into an agreement that the funds in the trust account were to be used to pay Shain's lien. He later acknowledged that the settlement agreement provided for some funds to be paid to Bergeron and Bradshaw jointly, some funds to be paid to Bergeron, and "a separate $25,000 set aside out of [Bergeron's] funds to handle [Shain's] lien."

Bergeron's belief at trial was that Bradshaw should be responsible for payment of Shain's attorney fee lien because Drexel Bradshaw had assured Bergeron that Bradshaw would "take care of it." Bergeron testified he was voiding the Bradshaw fee agreement.

Thomas LoSavio

Over Bradshaw's objection, Thomas LoSavio testified as Bergeron's expert on whether the Bradshaw fee agreement comports with the standard of care pursuant to section 6147. LoSavio also testified regarding the reasonableness of Shain's requested fee and the reasonable value of the legal services Bradshaw provided to Bergeron given Bergeron's voiding of the Bradshaw fee agreement.

LoSavio first opined that Shain's requested fee of $23,280 was reasonable. LoSavio next opined that the Bradshaw fee agreement was voidable under section 6147 because it did not disclose the existence of the Shain lien. LoSavio then testified as to the quantum meruit reasonable fee to which Bradshaw was entitled. LoSavio testified that in representing Bergeron, Bracamontes had spent 137.4 hours and Drexel Bradshaw had spent 6.9 hours. He determined that the reasonable hourly rate for Drexel Bradshaw, an

attorney with six years of experience, was $258.50. The reasonable hourly rate for Bracamontes, an attorney with less than one year of experience, was $214.50. Based thereon, LoSavio calculated that the total reasonable fee for the services of Drexel Bradshaw and Bracamontes was $41,758.90 and that Bradshaw's asserted total fees of $82,084.60 contained an overcharge of $40,305.70.[7]

Statement of Decision and Judgment

Following trial, the court issued a 15-page statement of decision and judgment concluding that the Bradshaw fee agreement violated section 6147(a)(2) by lacking explicit language that Shain's fee was to be paid by Bergeron. The court expressly found that Bradshaw had actual notice of Shain's attorney fee lien when Bracamontes checked the register of actions on January 24, 2007, and, thereafter, Bradshaw failed to modify the Bradshaw fee agreement to include language regarding the disposition of Shain's lien.[8] The court also found that Bergeron voided the Bradshaw fee agreement at trial, entitling Bradshaw to a reasonable fee for the services rendered on Bergeron's behalf. The court accepted LoSavio's opinion that $41,758.90 was the reasonable fee earned by Bradshaw. It concluded that since Bradshaw collected a fee of $160,000, the excess of $118,241.10 must be disgorged.

The court also concluded that Shain's attorney fee lien was valid and that Shain and Bergeron had agreed to set aside $25,000 from the total settlement of the Trust action to pay Shain's lien. It found that $23,280 was the legal fee owed to Shain, and concluded that amount, plus a maximum of $1,720 in interest, should be paid to Shain from the $25,000 set aside in trust.

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[7] Bradshaw presented no rebuttal evidence on the reasonable fee issue.

[8] The court stated that, in light of Bergeron's testimony that his "state of mind was gone" when he read and signed the Bradshaw fee agreement on January 24, 2007, and Drexel Bradshaw's conflicting testimony, Bergeron's veracity as to the circumstances surrounding his execution of the Bradshaw fee agreement on January 24 was in question. The court stated that Bergeron's testimony thereon would be ignored and evaluation of the Bradshaw fee agreement would be based solely on the testimony of Drexel Bradshaw.

The judgment ordered the $25,000 held in trust released to Shain. It also ordered Bradshaw to disgorge $118,241.10 of the $160,000 fee collected from the Trust action settlement and to pay the disgorged amount plus 10 percent interest to Bergeron. Bradshaw and Bergeron each timely appealed the judgment.

DISCUSSION

I. *Bradshaw's Appeal*

Bradshaw contends the court erred in concluding the Bradshaw fee agreement was voidable because it failed to comply with section 6147(a)(2). We agree.

A. *Standard of Review*

The court's statement of decision contains both findings of fact and conclusions of law. We review the court's factual findings to determine whether they are supported by substantial evidence. "To the extent the trial court drew conclusions of law based upon its findings of fact, we review those conclusions of law de novo. [Citation.]" (*Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554, 1558.) In addition, "we apply a de novo standard of review to the trial court's resolution of the underlying statutory interpretation issues." (*Absher v. AutoZone, Inc.* (2008) 164 Cal.App.4th 332, 337.)

B. *Section 6147*

Section 6147[9] is one of three related statutes delineating the required contents of various kinds of attorney fee agreements. (See §§ 6146-6148; *Arnall v. Superior Court*

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9 Section 6147 provides:

"(a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:

"(1) A statement of the contingency fee rate that the client and attorney have agreed upon.

"(2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.

(2010) 190 Cal.App.4th 360, 365.) These statutes were enacted to protect clients and to ensure that fee agreements are fair and understood by clients. (*Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033, 1037 (*Alderman*).) Section 6147 regulates the form and content of contingency fee contracts outside the context of medical malpractice actions. (*Alderman*, at p. 1037 & fn. 2.) It operates to "ensure that clients are informed of and agree to the terms by which the attorneys who represent them will be compensated." (*Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 460.)

Section 6147(a) requires contingency fee agreements to be in writing and include all of the following: a statement of the agreed upon contingency fee rate, a statement of how disbursements and costs will affect the contingency fee and the client's recovery, a statement regarding compensation for related matters, and a statement that the fee is not set by law but is negotiable. If a contingency fee agreement fails to comply with these requirements, it is voidable at the option of the client and the attorney is entitled to a reasonable fee for the services performed. (§ 6147, subd. (b); *Alderman, supra*, 205 Cal.App.3d at p. 1037.)

"(3) A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract. This may include any amounts collected for the plaintiff by the attorney.

"(4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client.

"(5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.

"(b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.

"(c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits.

"(d) This section shall become operative on January 1, 2000."

C. *The Bradshaw Fee Agreement Complied with Section 6147(a)(2) at the Time It Was Executed*

Bradshaw's main contention is that the trial court erred in concluding that section 6147(a)(2) required Bradshaw to modify the Bradshaw fee agreement with Bergeron after becoming aware of Shain's lien. Bradshaw argues that such a modification requirement is unsupported by section 6147(a)(2), by the cases relied on by the court, and by any decisional authority. Bradshaw asserts that requiring such modification burdens "all attorneys," and "deprives Shain, Bradshaw, and Bergeron the right to deal with Shain's lien outside of Bradshaw's fee agreement with Bergeron," i.e., conditioning settlement in the underlying action on placing $25,000 in escrow pending resolution of the fee dispute between Shain and Bergeron.

In its statement of decision, the court acknowledged that Drexel Bradshaw testified he did not learn of the lien until after the Bradshaw fee agreement was executed. The court then stated, "In any event, [Drexel] Bradshaw knew of the prior representation by Shain of Bergeron in the [Trust action] on the same day the [Bradshaw fee agreement] was signed . . . . **[T]he [c]ourt finds that Bradshaw had actual notice of Shain's lien when . . . Bracamontes checked the Register of Action on 1/24/07**. At that point, in the court's view, it was incumbent upon Bradshaw—if he wanted Bergeron to be responsible for payment of Shain's lien—to thereafter modify his contingency fee agreement and obtain Bergeron's informed written consent to reflect that he, Bergeron, was responsible for paying Shain's lien. See *Cazares v. Saenz* (1989) 208 Cal.App.3d 279 and [*In the*] *Matter of Van Sickle* ([Review Dept.] 2006) 4 State Bar Ct. Rptr. 980. This never happened."

By its own terms, the provisions of section 6147 apply "at the time the contract is entered into." (§ 6147, subd. (a); *Stroud v. Tunzi* (2008) 160 Cal.App.4th 377, 383.) The undisputed evidence is that at that time the Bradshaw fee agreement was entered into, Bradshaw was unaware of Shain's prior representation of Bergeron and the existence of Shain's attorney fee lien. Thus, at the time it was entered into, the Bradshaw fee

agreement did not violate section 6147(a)(2) by failing to provide that Bergeron was to bear the cost of Shain's attorney fee lien.

Cazares v. Saenz (1989) 208 Cal.App.3d 279 (*Cazares*) and *In the Matter of Van Sickle* (Review Dept. 2006) 4 State Bar Ct. Rptr. 980 (*Van Sickle*), cited by the trial court in support of its conclusion that Bradshaw had a duty to modify the Bradshaw fee agreement, are inapposite. In *Cazares*, Attorney Saenz associated with the law firm of Cazares & Tosdal, to represent the plaintiff in a personal injury action pursuant to a contingency fee agreement. Saenz and Cazares orally agreed to a 50/50 split of the contingency fee. (*Cazares*, at pp. 282-283.)[10] The Cazares & Tosdal partnership dissolved and Cazares, the lead attorney, who had performed substantial work on the plaintiff's case, could not continue practicing law because he was appointed to the bench. Saenz, with the help of two new lawyers, Khoury and Mazella, obtained a favorable settlement for the plaintiff, entitling Saenz to a fee of approximately $366,000. Saenz offered Cazares $40,000 for his work on the case; Cazares claimed Cazares & Tosdal was owed more than $183,000. A referee determined Saenz was entitled to deduct the $47,000 paid to Khoury and Mazella before calculating the 50 percent due Cazares & Tosdal, and judgment for Cazares & Tosdal was entered in the amount of $159,833. (*Id.* at pp. 283-284.) The Court of Appeal concluded that the inability of Cazares to complete the contract after his appointment to the bench discharged all obligations under the contract, entitling him to recover the reasonable value of the services he rendered before the discharge. (*Id.* at p. 286.) *Cazares* is inapposite as it did not concern section 6147, an attorney's duty to modify a contingency fee agreement, or the factual issues presented here.

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10 In a footnote, *Cazares* noted that at the time of the attorney's association agreement, the Rules of Professional Conduct provided that any agreement between lawyers to divide a fee must be consented to in writing by the client after full disclosure. However, since the rule was for the benefit of the client, and the client was not a party to the appeal, the Court of Appeal did not address the parties' failure to comply with that requirement. (*Cazares, supra,* 208 Cal.App.3d at p. 283, fn. 5.)

Van Sickle, a State Bar Court review of an attorney disciplinary proceeding regarding Attorney Van Sickle, involves the following facts: In 1994, client Hei entered into a contingency fee agreement with Attorney Nagel providing that Nagel would represent Hei in a personal injury action in exchange for one-third of any recovery. Nagel filed an action on Hei's behalf against two defendants. In August 1995, Hei substituted herself in propria persona in place of Nagel and Nagel filed a lien against any recovery in the case for costs and one-third of any recovery. Hei filed a separate personal injury action against one of the defendants. In October 1995, Hei and Van Sickle entered into a written contingency fee agreement whereby Van Sickle would represent Hei in the two personal injury actions in exchange for a fee of 35 percent of any settlement and/or judgment plus costs. The written agreement did not mention Hei's prior representation by Nagel, of which Van Sickle was aware. (*Van Sickle, supra,* 4 State Bar Ct. Rptr. at pp. 983-984.) After one of the personal injury cases settled in Hei's favor, a dispute regarding fees arose. Van Sickle testified that Hei agreed to assume the risk of paying Nagel's fees. Hei testified there was no such understanding. (*Id.* at pp. 985-986.)

The *Van Sickle* court concluded that Van Sickle violated the unconscionable fee prohibitions of the Rules of Professional Conduct by failing to disclose to Hei that he intended his 35 percent contingency fee to be in addition to the fee earned by Nagel. (*Van Sickle, supra*, 4 State Bar Ct. Rptr. at pp. 987-988.) The court concluded Van Sickle's fee agreement with Hei was materially ambiguous and therefore invalid, and, in the absence of a valid fee agreement, Van Sickle was entitled to the reasonable value of the services provided to Hei.[11] (*Id.* at p. 988.) Since the amount charged by Van Sickle was more than twice as much as Hei agreed to and what he was entitled to under a

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11 In a footnote, *Van Sickle* stated that "a second contingency fee may be charged pursuant to a fee agreement, *if* the attorney fully discloses the exact nature of his or her fees, i.e., that they are in addition to those charged by the first attorney, and the attorney has obtained the informed consent of the client. Under those circumstances (which were not present in the instant case) it is possible that the range of reasonable fees charged by the initial attorney and the successive attorney in total could exceed 30 to 40 percent . . . ." (*Van Sickle, supra,* 4 State Bar Ct. Rptr. at p. 989, fn. 13.)

quantum meruit theory, the court concluded the contingency fee charged and collected was unconscionable. (*Id.* at pp. 989-990.) Like *Cazares*, *Van Sickle* is inapposite as it did not concern section 6147, an attorney's duty to modify a contingency fee agreement, or the factual issues presented here.

Substantial evidence supports the court's finding that Bradshaw was unaware of Shain's prior representation of Bergeron and Shain's attorney fee lien at the time Bradshaw and Bergeron entered into the Bradshaw fee agreement. Consequently, at the time that agreement was entered into, it did not violate the provisions of section 6147(a)(2). Neither the court nor Bergeron provides authority for the proposition that after learning of the existence of the Shain attorney fee lien, Bradshaw had a duty to modify the Bradshaw fee agreement in order to enforce it, and we have found no such authority. The judgment directing Bradshaw to disgorge and pay to Bergeron $118,241.10 of the $160,000 fee collected from the Trust action settlement is reversed.[12]

II. *Bergeron's Appeal*

Bergeron concedes that Shain is entitled to $23,800 plus interest in attorney fees, but argues there is a dispute as to who is entitled to the $25,000 held in trust, an issue Bergeron asserts is dependent on the "enforceability of the release agreement" in connection with Shain's lien.[13] Bergeron contends the court erred in ordering the $25,000 held in trust released to Shain, arguing that sum should have been released to him and Bradshaw should have been responsible for payment of Shain's fee.

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[12] In light of our conclusion that the court erroneously concluded that the Bradshaw fee agreement violated section 6147(a)(2) and was voidable by Bergeron, we need not address Bradshaw's claim that liens do not need to be included in a statement of how disbursements and costs incurred "will affect the contingency fee and the client's recovery" under section 6147(a)(2). We also need not address Bradshaw's claim that the court erroneously admitted expert testimony by LoSavio on the issue of whether the Bradshaw fee agreement complies with section 6147(a)(2) because that issue was a question of law for the trial court.

[13] Bergeron's reference to "release agreement" means the agreement between Shain and Bergeron at the time of the settlement of the Trust action that the $25,000 held in trust would be used to pay Shain's fee.

In its statement of decision as regards the $25,000 held in trust, the court stated: "Shain contends that [it] released [its] attorney lien on condition that the parties put the sum of $25,000.00 from the settlement monies into a trust, to be used to pay [its] attorney fees, should the court find that [its] lien and/or claim for fees is valid. There is no true conflict on this point. The [c]ourt finds that [Shain's] lien/claim for attorney fees is valid and that this sum of $25,000.00 held in trust be used to pay Shain's fee. This trust concept was the mechanism created by the parties to pay Shain and the court finds little reason to abandon this mechanism now. Therefore, the [c]ourt finds that . . . the legal fee owed to Shain of $23,800.00 (plus interest in the maximum amount of $1,720.00) is to be paid from the monies set aside ($25,000.00) in trust for this purpose."

A. *Mistake of Fact*

Bergeron first argues that the court "made a mistake of fact in finding that there was no conflict between [him] and Shain regarding the release agreement." However, because Bergeron's mistake of fact claim is raised for the first time on appeal and is unsupported by legal authority we need not consider it. (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799; *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384.)[14]

B. *Theory That Release Agreement Lacked Lawful Object*

Bergeron next argues that the release agreement is not a valid contract because at the time of its formation "it lacked a 'lawful object' by being in contravention of case law and going against Public Policy." In support of his claim he cites Civil Code section

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14 In his reply brief, Bergeron states he "would not have filed his [c]ross-[a]ppeal but would have requested the [t]rial [c]ourt to clarify its ruling if [Bradshaw] had not appealed on February 16, 2011, two days after the [t]rial [c]ourt issued its [f]inal [s]tatement of [d]ecision, February 14, 2011." Pursuant to Code of Civil Procedure section 634, ambiguities or omissions in a statement of decision must be brought to the trial court's attention either before entry of judgment or in conjunction with a motion for new trial (Code Civ. Proc., § 657) or a motion to vacate and enter a new judgment (Code Civ. Proc., § 663). (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶8:23, pp. 8-8 to 8-9 (rev. #1 2011).) Bergeron did none of these things. Instead, he improperly raised this issue for the first time on appeal.

1550.[15] The thrust of Bergeron's argument is that the payment of Shain's lien from Bergeron's portion of the settlement proceeds, as a condition of the release agreement, resulted in Bergeron's paying Shain's fee in addition to paying Bradshaw's full contingency fee. With no citation to any evidence presented at trial, Bergeron argues that the common practice is for the successor attorney to pay the reasonable attorney fees of the prior attorney from the successor attorney's collected contingency fee. Citing *Cazares*, *Van Sickle*, and *Spires v. American Bus. Lines* (1984) 158 Cal.App.3d 211 (*Spires*), he argues, with no analysis, "the maximum fee that the client pays for legal services is the contracted contingency fee."

Shain objects that Bergeron's contention that the release agreement lacked a lawful object is a new legal theory being raised for the first time on appeal. Shain asserts that, not only is this a new theory of law, but it involves factual issues, such as the common practice of successor attorneys in contingency fee cases, which could have been addressed at trial if Bergeron had properly raised the issue.

"The general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial." (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780.) "[P]arties are not permitted to ' "adopt a new and different theory on appeal. To permit [them] to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." [Citations.]' [Citations.] Only when the issue presented involves purely a legal question, on an *uncontroverted record and requires no factual determinations,* is it appropriate to address new theories. [Citations.]" (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.) "This is grounded on principles of waiver and estoppel, and is a matter of judicial economy and fairness to opposing parties. [Citations.]" (*Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 629-630.)

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[15] Civil Code section 1550 provides: "It is essential to the existence of a contract that there should be: [¶] 1. Parties capable of contracting; [¶] 2. Their consent; [¶] 3. A lawful object; and, [¶] 4. A sufficient cause or consideration."

In reliance on *Cazares* and *Spires*, Bergeron asserted below that the release agreement was not enforceable because it would result in a fee exceeding the contracted for contingency fee. But those cases and Bergeron's arguments below do not address the issue of a contract's lack of a legal object. Moreover, Bergeron does not disagree with Shain's assertion that the illegal object claim involves factual issues which could have been addressed at trial if Bergeron had properly raised the claim below. Consequently, Bergeron's failure to argue below that the release agreement lacked a lawful object waives the claim on appeal.

C. Spires *and* Cazares

In a related claim, Bergeron asserts that payment of Shain's lien from Bergeron's portion of settlement proceeds as a condition of the release agreement resulted in Bergeron paying Shain's fee *in addition to* paying Bradshaw's full 40 percent contingency fee in violation of *Cazares* and *Spires*.[16]

Spires, supra, 158 Cal.App.3d 211, involved a fee dispute between attorneys regarding distribution of a contingent fee to discharged and current counsel. The *Spires* court concluded that where the contingent fee is insufficient to meet the quantum meruit claims of both discharged and existing counsel, a pro rata formula should be applied to distribute the contingent fee among all discharged and existing attorneys in proportion to the time they each spent on the case. "Such a formula [e]nsures that each attorney is compensated in accordance with work performed, . . . while assuring that the client will not be forced to make a double payment of fees." (*Id.* at p. 216.) *Spires* did not involve a fee dispute between a client and his former attorney or a client's execution of a contingent fee agreement without disclosing that he had previously been represented by counsel in the matter and had executed a contingent fee contract with the former counsel.

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16 Bergeron concedes that Shain, employed by him under a contingency fee contract and discharged by him after partial performance of the contract, is entitled to quantum meruit recovery of the reasonable value of services rendered up to the point of Shain's termination. (See *Fracasse v. Brent* (1972) 6 Cal.3d 784, 791.) And, as we noted, *ante,* Bergeron does not dispute the court's finding that the reasonable value of Shain's legal services to Bergeron is $25,000.

In this case, at the time Bergeron executed the Bradshaw fee agreement, he did not disclose to Bradshaw his prior representation by Shain in the Trust action.

Cazares is similarly inapposite. Like *Spires, Cazares* did not concern a fee dispute between a client and his former attorney or a client's execution of a contingency fee agreement without disclosing that he had previously been represented by counsel in the matter and had executed a contingency fee contract with the former counsel. Moreover, *Spires* and *Cazares* each involved a single contingency fee contract, not successive retainer agreements under the factual circumstances presented here.

In this case, Bergeron entered into a contingency fee agreement with Shain, and after discharging Shain, entered into a contingency fee agreement with Bradshaw. Substantial evidence supports the court's finding that at the time Bradshaw and Bergeron entered into the Bradshaw fee agreement, Bradshaw was unaware of Shain's prior representation of Bergeron in the Trust action and Shain's attorney fee lien.

Shain's entitlement to $25,000 in quantum meruit recovery for services rendered to Bergeron is undisputed. It is also undisputed that Shain secured its fee by filing its attorney fee lien, the validity of which is also undisputed. An attorney's lien under a contingency fee contract is a security interest in the proceeds of the litigation. (*Fletcher v. Davis* (2004) 33 Cal.4th 61, 67 (*Fletcher*); *Isrin v. Superior Court* (1965) 63 Cal.2d 153, 158.) A valid attorney fee lien protects the attorney's fee on discharge by the client. (*Siciliano v. Fireman's Fund Ins. Co.* (1976) 62 Cal.App.3d 745, 752.) The attorney fee lien "grants the [discharged] attorney considerable authority to detain all or part of the client's recovery whenever a dispute arises over the lien's existence or its scope." (*Fletcher*, at p. 69.) Thus, the lien can "significantly *impair* the client's interest by delaying payment of the recovery or settlement proceeds until any disputes over the lien can be resolved." (*Id.* at pp. 68-69.) The discharged attorney cannot recover his fees in the pending litigation; his lien claim must be litigated in a separate action. (*Carroll v. Interstate Brands Corp.* (2002) 99 Cal.App.4th 1168, 1172, fn. 3; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 598.)

Here, substantial evidence supports the court's finding that Bergeron and Shain agreed to release the $25,000 held in trust as payment of Shain's attorney fee lien. From the record before us it appears that Bergeron and Shain each got the benefit of their bargain—in exchange for Shain's release of its lien, Bergeron obtained immediate release of $277,000 in settlement funds. Bergeron has failed to demonstrate that his release agreement with Shain is unenforceable.

D. *Failure to Present Rational Basis for Ruling*

Finally, for the first time in his reply brief, Bergeron argues the trial court abused its discretion in failing to properly present a rational basis for its ruling. We reject the argument. First, "[p]oints raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) Bergeron has made no such showing. Second, it is not clear what ruling Bergeron is referring to in this claim of error.

DISPOSITION

The portion of the judgment ordering Bradshaw to disgorge $118,241.10 of the funds collected from the Trust action settlement and payment of that amount plus interest to Bergeron is reversed. The portion of the judgment ordering that the $25,000 held in trust be released to Shain is affirmed.

Bradshaw is awarded its costs in the Bradshaw appeal. Shain is awarded its costs in the Bergeron cross-appeal.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.